

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Improving Public Safety Communications)	WT Docket No. 02-55
in the 800 MHz Band)	
)	
Consolidating the 800 and 900 MHz Industrial/)	
Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules)	ET Docket No. 00-258
to Allocate Spectrum below 3 GHz for Mobile)	
and Fixed Services to Support the Introduction	of)	WAIVER
	REQUEST	
New Advanced Wireless Services, including)	EXPEDITED
	HANDLING	
Third Generation Wireless Systems)	REQUESTED!
)	
Petition for Rule Making of the Wireless)	RM-9498
Information Networks Forum Concerning the)	
Unlicensed Personal Communications Service)	
)	
Petition for Rule Making of UT Starcom, Inc.,)	RM-10024
Concerning the Unlicensed Personal)	
Communications Service)	
)	
Amendment of Section 2.106 of the Commission's)	ET Docket No. 95-18
Rules to Allocate Spectrum at 2 GHz for Use by)	
the Mobile Satellite Service)	

To: The Commission

**PETITION FOR PARTIAL WAIVER
AND/OR STAY**

Mobile Relay Associates ("MRA"), by its attorney and pursuant to Section 1.925 of the Commission's Rules, respectfully requests a limited and partial waiver or stay of the Commission's rebanding program as applied to MRA, to allow MRA to postpone the physical relocation of its subscriber base in the Denver EA pending the

outcome of MRA's pending petition for review of the Commission's rebanding rulemaking, now pending before the United States Court of Appeals for the District of Columbia Circuit in Case No. 04-1413, *Mobile Relay Associates, et al. v. Federal Communications Comm'n.* ("Court Case"). In support of this request, MRA states as follows.

BACKGROUND

In its *Rebanding Decision*¹ and *Supplemental Order*² herein, the Commission ordered a rebanding of the Part 90 800 MHz spectrum and the forced relocation of existing licensees, including MRA. MRA and another affected licensee, Skitronics, LLC, timely sought judicial review of those Commission decisions, including, among other things, the Commission's ruling that neither of them was entitled to relocate entirely into the new "ESMR Band" created by the Commission at 862-869 MHz for SMR licensees. That judicial review case, the Court Case,³ remains pending at this time. The briefing schedule has been completed, and oral argument is scheduled for two weeks from this coming Friday, February 3, 2006.

¹*Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 F.C.C.R. 14969 (2004) ("*Rebanding Decision*").

²*Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, Supplemental and Order on Reconsideration*, 19 F.C.C.R. 25120 (2004) ("*Supplemental Order*").

³In the Court Case, MRA and Skitronics also sought review of other aspects of the Commission's decisions besides the refusal to allow them to relocate entirely into the new ESMR band; however, those other aspects of the Court Case are not relevant to the instant request for waiver and/or stay.

Meanwhile, on October 5, 2005, the Commission ruled upon various petitions for reconsideration of the *Rebanding Decision* and *Supplemental Order*, in its *Reconsideration Order*.⁴ In the *Reconsideration Order*, the Commission partially reversed itself, and ruled that existing licensees holding both EA-based (*i.e.*, auction) and site-based 800 MHz spectrum could relocate all of their channel holdings into the new ESMR band, so long as such relocating licensees convert their systems to cellular architecture by the end of their current EA license term. *Reconsideration Order*, at ¶¶ 25-28. Thus, Skitronics, as a holder of both EA-based and site-based spectrum, will now be allowed to relocate all of its channel holdings into the new ESMR band.⁵

However, because all of MRA's spectrum is site-based in origin, the *Reconsideration Order* affords no relief whatsoever to MRA. Although MRA holds almost two megahertz (2 MHz) of spectrum within the Denver EA, more than most non-Nextel EA-based licensees, because of how that spectrum originally was licensed by the Commission, MRA still is not allowed to relocate into the new ESMR

⁴*Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, Memorandum Opinion and Order*, 20 F.C.C.R. 16015 (2005) ("*Reconsideration Order*").

⁵The various EA license terms expire in December, 2010 and March, 2011. MRA would be willing to accept the same condition upon its relocation into the ESMR band – *i.e.*, that all of MRA's operations will have been converted to ESMR by that time. However, because the Commission afforded relief not on the basis of what channel rights existed prior to rebanding, but rather, on the basis of which method the Commission used to choose among mutually-exclusive applicants, MRA was not given the chance to accept that condition and move into the ESMR band.

band on the same basis as Skitronics and other non-Nextel SMR licensees. The issue of whether MRA should be treated the same as the other licensees and allowed to relocate into the new ESMR band is a central issue in the Court Case.

The physical act of rebanding thousands of subscribers is a major task, and a very major disruption to those subscribers in their respective non-telecom businesses, as MRA made known to the Commission in this proceeding.⁶ As MRA has explained previously, each and every subscriber unit must be brought in to some specified location, either the customer's facility or that of MRA, and the driver and vehicle must wait while a technician either retunes the unit or replaces it (if it cannot be retuned). All of the waiting time is time lost for the driver and vehicle. For customers with fleets of vehicles, such a disruption costs considerably in time and money, and, especially with Nextel sales personnel offering special incentives timed to coincide with the retuning, many, indeed, possibly most, will elect to cancel their subscriptions rather than undergo such disruption even once. (Based on MRA's experience relocating its 800 MHz customers in California, MRA will lose at least half of its subscriber base from retuning, just from putting its customers through this process one time.)

If MRA were required to physically relocate all of its subscribers to new spectrum outside the new ESMR band, and then a month or two later, relocate

⁶*See, e.g.*, MRA Notice of *Ex Parte* Presentation filed October 23, 2002; MRA Written *Ex Parte* Presentation filed October 25, 2002; MRA Comments on Supplemental Comments of the "Consensus Parties" filed February 10, 2003, p.2 & n.2.

those subscribers a second time into the ESMR band, it would utterly destroy MRA's customer relationships, and at least three-quarters of its customers will almost certainly churn off MRA's system in anger and frustration. To lose that large a segment of its customer base is too much for MRA to be able to endure and still survive. In sum, to relocate twice is to go out of business, and to relocate prior to resolution of the Court Case effectively means having to choose between going out of business and electing not to relocate into the new ESMR band even if the Court subsequently rules that MRA should have had the opportunity to relocate there.

MRA had hoped that the Court Case would progress quickly enough for the matter to be resolved before MRA was required to physically relocate, or that Nextel or the Transition Administrator ("TA") would agree that MRA should be allowed to temporarily delay its move out of the former General Category (channels 1-120, 851-854 MHz) until the Court Case is decided. However, MRA was informed last week, in the course of the mediation effort respecting its 800 MHz spectrum, that Nextel and the TA are taking the position that absent a stay or waiver granted by the Commission, MRA must relocate now, even if that means a second relocation a month or two later after the Court Case is resolved.⁷ Thus, MRA has no choice but

⁷As the Denver EA is in Wave One, MRA and Nextel entered into mediation to resolve remaining issues on relocation. The only remaining issues in mediation are: 1) whether MRA should be allowed to temporarily postpone physical relocation pending the outcome of the Court Case so as to avoid the spectre of having to relocate the same subscribers twice; and 2) whether the parties should build into the frequency relocation agreement alternative frequencies and reimbursement provisions so that, no matter what the outcome of the Court Case, the parties may move immediately to implement relocation without having to engage in any

to seek immediate relief directly from the Commission.

NATURE OF RELIEF REQUESTED

The relief MRA is requesting herein is much more limited in scope than was the stay that it requested earlier in this proceeding. MRA is not here requesting that the rebanding process in general be stayed, nor is it even requesting that the process be stayed in the Denver EA as a whole. Finally, MRA is not asking even that all aspects of the rebanding process be stayed as to MRA itself. MRA would continue to be obligated to negotiate with Nextel concerning its relocation, and required to enter into a frequency relocation agreement with Nextel – so long as that agreement allows MRA to postpone physical relocation until the Court Case is decided, and otherwise avoids mooted the issues pending before the Court.

In other words, MRA asks only that it not be deprived of its day in court by having the rebanding become a *fait accompli* before the Court has an opportunity to rule.

DISCUSSION

additional negotiations.

MRA's position is that the answer to both questions should be "yes", and has proffered alternative contract provisions to cover all contingencies, from MRA prevailing on all points to Nextel and the Commission prevailing on all points (and everything in between). Nextel and the TA have now taken the position that the answer to both questions is "no." MRA is willing to concede the second question in the interest of compromise, but cannot concede the first question without putting the continued existence of its Colorado operations into complete jeopardy.

Good cause exists for the temporary relief requested herein. The delay requested is temporary from a time standpoint. The oral argument in the Court Case is February 3, and the Court has expedited its handling of the matter, already having denied a Commission request to delay the briefing schedule.⁸ Thus, the requested relief likely involves only two or three months, and possibly only a matter of weeks.

The harm to other parties is more limited than is the devastating harm to MRA from denial of this temporary delay. According to a letter from Nextel to the City and County of Denver (“City”), dated February 17, 2004 and subsequently filed by the City in this proceeding, Nextel has implemented channel use restrictions on all Nextel channels that could impinge on the City’s control channels until the rebanding process is completed, thus greatly limiting the degree of harmful interference to the City’s Public Safety operations in the short term.⁹

Admittedly, Nextel’s voluntary implementation of such channel restrictions restricts Nextel’s channel usage and reuse plans for the short term, but Nextel has been able to continue to function, and also has successfully added short-term capacity by acquiring 900 MHz spectrum in the Denver EA in the meantime. The harm to Nextel from continuing with the *status quo* for a little while longer is far less than the harm which MRA would incur if it has to disrupt all of its subscribers’ operations twice in such a short period.

Moreover, MRA has done everything within its power to shorten the duration

⁸See *Order*, dated April 5, 2005 in Case No. 04-1413.

⁹See March 5, 2004 *ex parte* filing by the City and attachments thereto. Petition for Partial Waiver and/or Stay, p.7

of any delay. MRA has agreed with Nextel on all costs of rebanding other than the cost of customer churn, and MRA offered to include a contingent amount for churn if the Court rules it to be a reimbursable cost, so as to avoid having to negotiate that question later, but Nextel refused to discuss the issue. Similarly, MRA has agreed with Nextel on the channels to which it would relocate if it is found not to be entitled to relocate into the ESMR band, and MRA offered to agree on a contingent basis on the specific channels to which it would relocate within the ESMR band if found eligible to so relocate, but Nextel has refused to discuss that issue.

Separately, there is a public interest in allowing a person his or her day in court, including MRA. When the petition for review was first filed with the Court, the single most important issue was whether MRA and Skitronics would be allowed to relocate into the new ESMR band, like their competitor, Nextel. Although the Commission itself has since answered that question in the affirmative with respect to Skitronics, that question remains the single most important issue for MRA before the Court. Indeed, since the ability to eventually convert to high-density cellular architecture is critical to MRA's future in the industry, it would be a miscarriage of justice to deprive MRA of the opportunity to prevail in the Court Case on this issue.

MRA meets the standards for grant of such a temporary waiver as set forth in Section 1.925 of the Rules.¹⁰ The underlying purpose of the rebanding rules as a

¹⁰Section 1.925 of the Rules reads in pertinent part as follows:

The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be

whole is to provide a long-term solution to Public Safety's need for additional spectrum and its need to be free of interference from neighboring high-density cellular architecture systems, while accomplishing those objectives in a manner to minimize disruption to the operations of innocent non-Public Safety licensees and their customers. Grant of the requested temporary waiver is needed to accomplish the Commission's stated goal of avoiding undue disruption to innocent licensees and their customers.

Because grant of the requested temporary waiver will preserve the integrity of the administrative process by preserving MRA's day in court, it is in the public interest. The public has a stake in having an administrative process that is fair to all. The public is harmed when a court of competent jurisdiction, such as the Court of Appeals here, is effectively deprived of its appellate jurisdiction function by having an irreversible result imposed before the Court has an opportunity to rule in a pending case.

Separately, because of the unique situation in which MRA finds itself, at least temporarily, immediate application of the rules to MRA would be inequitable and unduly burdensome, and MRA has no reasonable alternative. To repeat, MRA has done everything within its power to avoid the current situation, including offering to enter into an agreement with Nextel contingent on the outcome of the Court Case, so that MRA can physically relocate immediately once the Court has an opportunity to rule. Short of voluntarily dismissing its Court Case, there is nothing else MRA could have done up to this point, and such a voluntary dismissal is not a

inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

reasonable alternative.

CONCLUSION

For all of the foregoing reasons, MRA should be granted a temporary waiver of the obligation to physically relocate out of the 851-854 MHz band, pending a determination of where MRA will be permitted to relocate into, following resolution of the Court Case.

Respectfully submitted,
MOBILE RELAY ASSOCIATES

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By: /s/
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